In the Supreme Court of the United States

OCTOBER TERM, 1942

NO. —— ORIGINAL

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA FOR A WRIT OF PROHIBITION AND/OR MANDAMUS AGAINST THE HONORABLE FRANCIS G. CAFFEY, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, AND THE OTHER JUDGES AND OFFICERS OF SAID COURT, AND FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION OR WRIT OF MANDAMUS, OR BOTH, TOGETHER WITH A PRAYER FOR A WRIT OF CERTIORARI

Now comes the Solicitor General on behalf of the United States of America and moves:

1. For leave to file the petition for a writ of prohibition or mandamus, or both, hereto annexed, under Sections 234 and 262 of the Judicial Code (28 U. S. C. secs. 342, 377);

2. That said petition, which includes an appropriate prayer therefor, be considered also as a petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit, under Sec-

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tion 262 or 240 (a) of the Judicial Code (28 U. S. C. sec. 377); and

3. That a rule be entered and issued directing the District Court of the United States for the Southern District of New York and the Honorable Francis G. Caffey, a judge thereof, and the other judges and officers of said court, to show cause why such writs should not issue, in accordance with the prayer of said petition, and why the United States of America should not have such other and further relief therein as may be just.

The petition for a writ of prohibition or mandamus, or both, referred to in paragraph 1, *supra*, appears to be the proper mode of challenging the jurisdiction of a district court when proceeding in admiralty, *Ex parte Republic of Peru*, No. 13, Original, 1942 Term, particularly where, as here, application for the writ was made to the circuit court of appeals, which declined to entertain the application. *Ex parte Muir*, 254 U. S. 522, 530; (see *Muir* v. *Chatfield*, 255 Fed. 24 (C. C. A. 2d)); cf. *Ex parte Kawato*, 317 U. S. 69, 71. The authority conferred on this Court by Section 234 of the Judicial Code to issue writs of prohibition to district courts in admiralty is itself a grant of appellate jurisdiction and hence does not involve the question whether the writ is "necessary for" the exercise of appellate jurisdiction other-

wise conferred, within the meaning of Section 262 of the Judicial Code.

The petition for a writ of certiorari, referred to in paragraph 2, *supra,* is added in the event that this Court should wish to consider separately the question of the jurisdiction of the circuit court of appeals to grant prohibition or mandamus, or both, in the circumstances here presented. The granting of certiorari under Section 262 of the Judicial Code where the circuit court of appeals has declined to permit a case to be docketed, deeming itself to be without jurisdiction, appears to be sanctioned by *In re 620 Church Street Corporation,* 299 U. S. 24; *Holiday* v. *Johnston,* 313 U. S. 342; and *Steffler* v. *United States,* No. 14, Original, 1942 Term. If necessary, however, it is requested that the petition be treated as one for certiorari under Section 240 (a) of the Judicial Code, to review a judgment of the circuit court of appeals. Cf. *Ex parte Quirin,* 317 U. S. 1, 24 (appeal from district court's denial of leave to file).

CHARLES FAHY,
Solicitor General.

FRANCIS M. SHEA,
Assistant Attorney General.

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PETITION FOR A WRIT OF PROHIBITION OR WRIT OF MANDAMUS, OR BOTH, TOGETHER WITH A PRAYER FOR A WRIT OF CERTIORARI

The petition of the United States of America for a writ of prohibition or a writ of mandamus or both, against the Honorable Francis G. Caffey, Judge of the District Court of the United States for the Southern District of New York and against the other judges and officers of said court, and for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, respectfully shows:

I. On April 15, 1942, there was filed in the United States District Court for the Southern District of New York sitting in admiralty by AGWILINES, INC., a Maine corporation, a certain libel in a cause of collision, civil and maritime, entitled "AGWILINES, INC., as owner of the Steamship *Brazos* and as bailee of the cargo laden therein, against THE UNITED STATES OF AMERICA" docketed In Admiralty No. 124-337 (R. 2-3, 7-9).[1] Process in the usual form was issued and served on the United States (R. 2-3).

II. Said libel alleged ownership by libellant of the Steamship *Brazos;* that the *Brazos* had on January 13, 1942, been in collision with a certain motor vessel, formerly named *Moremacland,* caused solely by the fault and negligence of said motor vessel and those in charge of her; and that as a result of the collision libellant had sustained damages including loss of the Steamship *Brazos* and her cargo and personal effects of those on board her and other expenses in the sum of $850,000. The libel alleged ownership by the United States of the said motor vessel, and that at the time of the collision it was a public vessel of the United States; and it invoked the jurisdiction of the United States District Court under the Public Vessels Act of March 3, 1925, c. 428, 43 Stat.

[1] References are to the printed certified transcript of proceedings in the district court and the circuit court of appeals, in lieu of exhibits to this petition.

1112 (46 U. S. C. 781–790), and prayed recovery of damages from the United States (R. 7–9).

III. Thereafter, and in proper time, the United States of America, respondent in said cause, appearing specially, excepted to said libel for want of jurisdiction of the District Court and filed exceptive allegations (R. 10–12).

IV. Said exceptive allegations showed that the vessel referred to as formerly named *Moremacland* was not a merchant vessel nor a tugboat; and that she was a vessel of war, renamed H. M. S. *Archer*, in the possession and under the exclusive command and control of the British Government, and commissioned, officered, manned, supplied, and operated by that Government. The exceptive allegations showed that the H. M. S. *Archer* had this status at the time of the collision and ever since November 17, 1941, when the United States, being the owner of the *Moremacland*, delivered the vessel to Their Lords Commissioners of the Admiralty, on behalf of His Britannic Majesty, pursuant to the provisions of the Lend-Lease Act of March 11, 1941, c. 11, 55 Stat. 31 (22 U. S. C., Supp. I, Secs. 411–422). (R. 10–11.)

V. Said exceptive allegations concluded that by reason of the matters therein shown, H. M. S. *Archer* being a vessel of war and not having been employed as a merchant vessel and not being a tugboat, and being a public vessel of the United Kingdom rather than a public vessel of the United

States, the proceeding in the District Court is outside the scope of the Suits in Admiralty Act of March 9, 1920, c. 95, 41 Stat. 525 (46 U. S. C. Secs. 741–752) and of the Public Vessels Act of March 3, 1925, c. 428, 43 Stat. 1112 (46 U. S. C. Secs. 781–790); is a suit against the United States without its consent; and is outside the jurisdiction of the District Court (R. 12).

VI. Following the filing of said exceptive allegations by the United States, certain parties, being OLAVARRIA & Co., INC., and others, as intervening-petitioners obtained leave of the District Court to intervene as owners of the cargo laden on the *Brazos* and filed a petition substantially copying the allegations of the libel and praying recovery of damages from the United States for the alleged injury to said cargo in the sum of $142,000 (R. 4, 12–16).

VII. The United States consented to the said intervention without prejudice to its exceptive allegations, and it was agreed by the intervening-petitioners that the exceptive allegations be considered as applying to the intervening-petition as well as to the libel (R. 4).

VIII. The facts alleged in said exceptive allegations were accepted as true, and not disputed by either the libellant or the intervening-petitioners. Instead, the libellant brought on said exceptive allegations for argument, and moved the District Court for an order to strike out said exceptive allegations, and the intervening-peti-

tioners joined in said motion. (R. 16.) The motion was argued before Honorable Francis G. Caffey, United States District Judge, on February 2, 1943. On March 12, 1943, District Judge Caffey filed an opinion, wherein for reasons stated, he announced that the motion would be granted (R. 16–27). In said opinion he held that the H. M. S. *Archer* was a "public vessel of the United States" within the meaning of that phrase in the Public Vessels Act, and that the District Court had jurisdiction of the cause. Thereupon, the said court assumed jurisdiction of the cause and will proceed to hear and determine the merits thereof.

IX. Thereafter, by order dated April 3, 1943, the motion of the libellant and intervening-petitioners for an order striking out the exceptive allegations was granted in all respects; and it was ordered that the exceptive allegations were dismissed, and that the United States appear and answer the libel and the intervening petition (R. 28).

X. As appears from the foregoing, the undisputed facts set forth in the exceptive allegations, stricken and dismissed by the District Court, showed that the sole relationship of the United States to the matter sued on is that, being the owner of the *Moremacland,* the United States delivered the vessel as lend-lease aid to the British Government, who in turn commissioned her in

the British Navy as a vessel of war, renamed H. M. S. *Archer,* and who operated her in that status at the time of the collision.

XI. Petitioner submits that by reason of the matters set forth in the exceptive allegations above referred to, the District Court was and is without jurisdiction to proceed to hear and determine the matters alleged in the libel and intervening petition; that the District Court erred in striking and dismissing the exceptive allegations which showed its lack of jurisdiction; and that the District Court erred in holding that on the facts presented by said exceptive allegations the H. M. S. *Archer* was a "public vessel of the United States" within the meaning of that phrase in the Public Vessels Act which consents to suit against the United States "for damages caused by a public vessel of the United States."

XII. The order made by District Judge Caffey dated April 3, 1942, is not an appealable order, and the question of the jurisdiction of the District Court over said cause can be presented on appeal only after answer and trial on the merits and a resulting decree determining the rights and liabilities of the parties. The availability of such an appeal ultimately is an inadequate remedy, since the United States would be put to the burden of an elaborate investigation and trial and since the facts, evidence, and witnesses to the issues on the merits are in the control of the

British Navy. The difficulties thus presented, together with the importance of not diverting naval personnel from combat functions during this time of war, will render the Government's preparation and defense on the merits wholly inadequate.

XIII. Petitioner further submits that the question presented of the jurisdiction of the District Court in these circumstances is a question of large importance warranting prompt and authoritative determination. Numerous vessels have been delivered to our allies as lend-lease aid. Should the District Court's decision be upheld ultimately, further legislation or international arrangements may prove desirable in order to protect the interests of the United States. Such treatment would be premature pending authoritative determination of the question now presented.

XIV. In view of the foregoing, petitioner prepared and on April 28, 1943, presented to the United States Circuit Court of Appeals for the Second Circuit a motion for leave to file a petition for a writ of prohibition or a writ of mandamous, or both, against the Honorable Francis G. Caffey, Judge of the District Court of the United States for the Southern District of New York, and the other judges and officers of said court. The petition annexed to said motion prayed for a writ of prohibition prohibiting further proceedings in said cause in the district court and for a writ of mandamus directing the vacat-

ing of the order of April 3, 1943, and the entry of an order dismissing the cause for want of jurisdiction (R. 2–6).

XV. Jurisdiction of the Circuit Court of Appeals was invoked under Section 262 of the Judicial Code (28 U. S. C. Sec. 377) empowering said court to issue all writs necessary to the exercise of its jurisdiction. That court would have appellate jurisdiction on appeal from any final decree in the cause or from any interlocutory decree determining the rights and liabilities of the parties, under Sections 128 and 129 of the Judicial Code (28 U. S. C., Secs. 225, 227), and the jurisdiction of said court to issue a writ of prohibition or a writ of mandamus, or both, in aid of its appellate jurisdiction was invoked by said petition.

XVI. Upon the presentation of said motion and petition to the Circuit Court of Appeals on April 28, 1943, before the Honorable Thomas W. Swan, Circuit Judge, sitting to hear *ex parte* applications pursuant to the rules of said court, he signed an order dated April 28, 1943, directing the United States District Court for the Southern District of New York, and the Honorable Francis G. Caffey and the other judges and officers of said district court to show cause before the Circuit Court of Appeals on May 3, 1943, why the motion of the United States for leave to file its petition should not be granted. Said order to show cause also directed the attention of counsel to the ques-

tion whether the Circuit Court of Appeals had jurisdiction of the proceeding sought to be instituted by the filing of said petition. The order to show cause cited *Muir* v. *Chatfield,* 255 Fed. 24 and *Ex Parte Republic of Peru,* United States Supreme Court, October Term 1942, No. 13 Original, decided April 5, 1943, and directed that the argument on the return to the order to show cause be confined to the question of the jurisdiction of the Circuit Court of Appeals (R. 1).

XVII. Said order to show cause together with said motion and petition were duly served on April 28, 1943, by leaving a copy of the order, motion, and petition with the Clerk of the United States District Court for the Southern District of New York. The same were likewise served the same day by leaving copies with the proctors for the libellant in the district court and with the proctors for the intervening petitioners in the district court.

XVIII. On May 3, 1943, the matter came on to be heard before the Circuit Court of Appeals, Circuit Judges Swan, Clark, and Frank sitting. At the close of the argument on behalf of the motion, the court announced that it had decided to deny the motion for want of jurisdiction of the Circuit Court of Appeals. Thereafter the Circuit Court of Appeals, by an order made and entered dated May 3, 1943, denied the motion for want of jurisdiction of that court. (R. 29.)

XIX. The jurisdiction of this Court under sections 234 and 262 of the Judicial Code to issue a writ of prohibition or a writ of mandamus, or both, to the United States District Court for the Southern District of New York is hereby invoked. Viewed as a petition for writs of prohibition and mandamus, the question presented by this petition is: Whether, notwithstanding exclusive possession, operation and control of H. M. S. *Archer* by the British Navy, the lend-lease arrangements with respect to that vessel rendered her a "public vessel of the United States" within the scope of the Public Vessels Act.

XX. There is likewise hereby invoked the jurisdiction of this Court, under Sections 262 and 240 (a) of the Judicial Code, to review by writ of certiorari the decision of the United States Circuit Court of Appeals for the Second Circuit. To accompany this petition, treating it as a petition for a writ of certiorari to the Circuit Court of Appeals, there is being filed herewith a certified copy of the record in the Circuit Court of Appeals. Viewed as a petition for a writ of certiorari an additional, and preliminary, question presented is: Whether the circuit court of appeals had jurisdiction under Section 262 of the Judicial Code to issue writs of prohibition and mandamus to the district court to prohibit proceedings in that court in excess of its jurisdiction. In holding in the negative, the circuit court of appeals followed its

own prior decision to that effect in *Muir* v. *Chatfield*, 255 Fed. 24, and declined to follow the dictum of this Court to the contrary, and the apparent assumption in each of the opinions, in *Ex Parte Republic of Peru*, October Term 1942, No. 13 Original, decided April 5, 1942. Apart from the merits of the application for the writ, the question of the jurisdiction of the Circuit Court of Appeals to entertain the proceeding for the writ is a question of general importance that should be authoritatively settled by this Court.

WHEREFORE the United States of America, the aid of this honorable Court respectfully requesting, prays:

1. That a writ of prohibition may issue out of this honorable Court to the said Honorable Francis G. Caffey, Judge of the United States District Court for the Southern District of New York, and the other judges and officers of said court, prohibiting him and them from taking any steps whatsoever in the cause aforesaid, other than to dismiss the same for want of jurisdiction, and generally from the further exercise of jurisdiction in said cause, or the enforcing of any order, judgment, or decree made under color thereof.

2. That a writ of mandamus may issue out of this honorable court, directing and commanding the Honorable Francis G. Caffey, Judge of the United States District Court for the Southern District of New York, or such other of the judges

of the said court as may be assigned to the matter, to vacate the order of April 3, 1943, so entered by him, striking and dismissing the exceptive allegations of the United States and directing the United States to answer the libel and intervening petition, and further to enter an order in said cause dismissing the libel and the intervening petition for want of jurisdiction.

3. That the court grant to the United States of America such other and further relief as may be just in the premises, including a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review its order of May 3, 1943, denying the motion of the United States of America for leave to file its petition in that court for a writ of prohibition and/or a writ of mandamus.

CHARLES FAHY,
Solicitor General.

FRANCIS M. SHEA,
Assistant Attorney General.

DISTRICT OF COLUMBIA,
City of Washington, ss:

Francis M. Shea, being first duly sworn, deposes and says: I am the Assistant Attorney General in charge of the Claims Division of the Department of Justice and as such have charge on behalf of the United States of the admiralty litigation to which it is a party. I have read

the foregoing petition and know the contents thereof, and am familiar with the proceedings in the United States District Court for the Southern District of New York and in the Circuit Court of Appeals for the Second Circuit to which reference is made in said petition. The statements of fact contained in the foregoing petition are true to the best of my knowledge, information, and belief.

FRANCIS M. SHEA,
Assistant Attorney General.

Sworn to before me this 31st day of May 1943.

[NOTARIAL SEAL] MARY G. KITE,
Notary Public, District of Columbia.

U. S. GOVERNMENT PRINTING OFFICE: 1943